



# FAIRFAX COUNTY

## OFFICE OF THE COUNTY EXECUTIVE

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V I R G I N I A

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October 29, 1997

Office of the Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, DC 20554

RECEIVED  
OCT 30 1997  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

Dear Sirs:

The enclosed is submitted pursuant to the Federal Communications Commission's request for comments in the matter of Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement and Construction of Broadcast Transmission Facilities, Docket No. 97-182. The original and ten copies are enclosed.

Please contact Mr. Ron Mallard, Cable Administrator, Department of Consumer Affairs at (703) 324-5959 if additional information is needed to properly evaluate the enclosed comments.

Sincerely,

Robert J. O'Neill, Jr.  
County Executive

Enclosure

cc: Fairfax County Board of Supervisors

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.

SEP 30 1997  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C.

In the Matter of

Preemption of State and Local	)	
Zoning and Land Use Restrictions	)	
On the Siting, Placement and	)	MM Dk. No. 97-182
Construction of Broadcast	)	
Transmission Facilities	)	

COMMENTS OF FAIRFAX COUNTY, VIRGINIA

I. INTRODUCTION

The Federal Communications Commission ("Commission"), through this proceeding, seeks comment on whether, or in what circumstances, the Commission may preempt certain state and local zoning and land use ordinances in order to implement the rapid deployment of digital television ("DTV") services. The Commission also asks whether such preemptive authority should extend to other already-deployed broadcast media, such as radio and analog television facilities.

There are two full power broadcast television towers in Fairfax County, Virginia ("County"). WNVC, a non-commercial educational television station, has a tower at the junction of U.S. 29 and I-495, near Merrifield, Va. The present tower is 636 feet high and 705 feet over the average terrain.<sup>1</sup> WVVI, Channel 66 uses a tower on Ox Road in Fairfax Station that is 397 feet high, 551 feet above the average terrain.<sup>2</sup> Both are in the Washington, D.C. Designated Market Area ("DMA"). WVVI, a non-

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<sup>1</sup> Warren Publishing, 65 Cable and Television Factbook A-1368 (1997).

network commercial station, is required to complete construction of its DTV facilities no later than May 1, 2002; WNVC must complete construction by May 1, 2003.<sup>3</sup> Thus, there is plenty of time for applicants to follow normal land use processes which, in the County, are usually measured in months, not years.

Land use regulations in Virginia flow from the police power of the state which, for the most part, is delegated to local governments such as the County. The purpose of these powers is to protect, promote and improve the public health, safety and general welfare.<sup>4</sup> For the Commission to ask whether it should preempt state and local land use authority is for the Commission to presume that it has the power to do so. The Commission does not have the broad authority to usurp so basic a power allocated to the states by our constitutional division of powers.

However, assuming arguendo that the Commission has such broad power, the County submits that it should not be exercised on such inadequate grounds. County residents and businesses may be materially adversely affected by such preemption since the normal protections, the very heart of the police power of the state, would be removed.

The County is concerned that preemption of the County's land use regulation, even for the limited purpose of encouraging deployment of DTV, will deprive the County's residents of any

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<sup>2</sup> Id. At A-1178.

<sup>3</sup> In the Matter of Preemption of State and Local Zoning and Land Use Restrictions On the Siting, Placement and Construction of Broadcast Transmission Facilities, Notice of Proposed Rulemaking, MM Dk. No. 97-182 (released August 19, 1997) ("NPRM") at Par. 2.

<sup>4</sup> See Va. Code Sections 15.1-427, 446.1 and 489 (Michie 1996 Cum. Supp.).

meaningful control over the physical structure and appearance of their communities.

Representatives of the broadcast television and radio industries are asking the Commission to abrogate the preference for localism that is at the heart of FCC public interest regulation. Every other private occupant of real estate within the jurisdiction of the County, whether commercial or residential, must comply with state and local land use laws. Why should the broadcast industries be given an exception from these laws? Just as the Department of Commerce does not attempt to preempt local land use regulations on behalf of manufacturing and production facilities, the Commission should not preempt local land use authority on behalf of the broadcast industry, particularly when the major objection to the exercise of such authority is simply inconvenience.

In light of this, there is no justification for distinguishing between broadcasters and any other person or entity seeking to construct facilities in the County. If anything, the potential size and potential hazards these towers pose make it imperative that local governments ensure that they are structurally sound, placed away from residential areas whenever possible, and collocated with other broadcast antennae. This is necessary to promote the public health, safety and welfare and avoid needless negative economic impact and dangers.<sup>5</sup>

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<sup>5</sup> The dangers to such tall structures include accidental aircraft damage and extreme weather conditions. The location of such towers must consider those possibilities; See, e.g., Reuters, "Parts of Dakotas Declared Federal Disaster Areas," Washington

## II. DISCUSSION

### A. LOCAL LAND USE REGULATION WILL CREATE NO SIGNIFICANT TIME OBSTACLE FOR MOST U.S. BROADCAST TELEVISION STATIONS

Television broadcasters have been on official notice of the digital television rollout deadlines since April 21, 1997. Even the tightest deadline of May 1, 1999, provides those specific commercial stations more than two years to design, seek all necessary government approvals, and construct whatever additional facilities may be required. The jurisdictions in the 11<sup>th</sup>-30<sup>th</sup> DMAs have an additional six months to begin operations. The stations in Fairfax County (WVVI and WNVC) have four to five years for the planning and construction process. To date, no applications to establish DTV facilities have been submitted to the County for approval.

The County shares the Commission's concern that DTV be implemented expeditiously -- the County has a significant interest in the Commission's ultimate redistribution of the analog television spectrum, should the Commission decide to use such recovered spectrum for police, fire, and other public safety uses.<sup>6</sup> Local governments simply have no reason to want to impede

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Post, April 8, 1997, A3 (television transmission tower blown down by high winds).

<sup>6</sup> See *In the Matter of Advanced Television Systems and Their Impact Upon Existing Television Broadcast Services*, MM Dk. No. 87-268, Fifth Report and Order, FCC 97-116 (released April 21, 1997) ("Fifth Report and Order") at Par. 94 (reclaimed analog television spectrum to be distributed to local governments

DTV rollout. In fact, citizens will probably demand quick implementation, especially in Fairfax County.

Nonetheless, the County has a strong interest in protecting the public health, safety, and general welfare of its residents.

Limiting the review period to, at most, one and a half months, when a broadcaster has between two and five years to design and construct its facilities simply is not rationally related to its stated goal of speedy construction. There is no justification to preempt the County's right to ensure that television broadcasters do not endanger the health, safety and welfare of its citizenry and the community's interest in rational economic development and protection from negative economic or safety impacts. One and a half months is also a "one size fits all" mandate for which the federal government has come under criticism. It does not take into account local factors such as the volume of other scheduled activities, the meeting schedules of local entities (i.e., once a month, twice a month), etc.

B. THE PLANNING AND ZONING PROCESS PROTECTS THE PUBLIC INTEREST

1. Zoning and Land Use Regulation Addresses Local Health, Safety and Aesthetic Concerns

The Commonwealth of Virginia has a compelling interest in permitting its localities to create and implement land use plans within their jurisdictions. Virginia Code Section 15.1-427

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agencies for public safety purposes).

(Michie 1996 Cum. Supp.) provides the standard for local land use planning, stating that land use authority should:

improve the public health, safety and convenience and welfare of its citizens and to plan for the future development of communities to the end that ...new community centers be developed with adequate ... utility [and] health ... facilities; ... that residential areas be provided with healthy surroundings for family life ... and that the growth of the community be consonant with the efficient and economical use of public funds.

Va. Code Section 15.1-427.<sup>7</sup>

Virginia's state code is similar to state codes throughout the country that give local jurisdictions the right to regulate land use. One reason for giving regulatory power to local communities is simple -- local residents must live with the consequences. The County, like many other jurisdictions, regulates radio and television towers in its zoning ordinance.<sup>8</sup>

With the rapid growth in wireless communications, localities' ability to ensure that these facilities harmonize with their surroundings has become more critical. Television towers are not only collocated with FM radio stations, but with satellite dishes, microwave, pager, cellular and PCS

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<sup>7</sup> Va. Code Section 15.1-427 will be recodified as Va. Code Section 15.2-2200, effective December 1, 1997 (1997 Va. Acts, Ch. 587).

<sup>8</sup> Fairfax County Zoning Ordinance, Ch. 112, Sec. 9-006, 101-104 (1997).

transmitters, and possibly wireless Internet transmitters and receivers. Inefficient proliferation of broadcast towers is not in the public interest.

## 2. Local Control is Not a Significant Obstacle to DTV Conversion

The County has no incentive or desire to delay DTV implementation -- quite the contrary. Land use planning and zoning are not designed to pit the locality against the property owner. Instead, planning and zoning should be and are a collaborative process between the developer, local officials and citizens. This process protects the general welfare.

Land use regulations normally ensure that, for example:

- facilities are safe and structurally sound;
- certain types of structures or businesses are not too close to elementary or secondary schools;
- proposed development does not create unnecessary traffic congestion or negatively affect the appropriate development of neighboring parcels;
- residential areas "be provided with healthy surroundings for family life"<sup>9</sup>; and
- when possible, development is in harmony with the community's aesthetic concerns, which of course, translates directly into maintaining or enhancing property values.



Collaborative processes between broadcasters and local officials can prevent problems before they occur, even under relatively short timelines. To our knowledge, there is no legitimate reason set forth as to why broadcasters and localities cannot reach mutually agreeable solutions well within even the May 1999 deadline.

Where local authorities delay the process or fail to approve a requested application, it may well be because such delay or denial is necessary to preserve health and safety and to ensure that the project meets legitimate and lawful concerns. Virginia law presumes that officials will act lawfully.<sup>10</sup> If a question should arise in this regard in a specific situation, local remedies exist, such as mandamus.<sup>11</sup>

The National Association of Broadcasters' ("NAB") petition seeks federal preemption not only of planning and zoning regulations, but also of all local regulation including building codes and local radio frequency exposure standards.<sup>12</sup> This would allow a broadcast tower to be placed, for example, adjacent to an elementary school, which is particularly dangerous. If federal preemption prevents local building inspectors from ensuring the tower's safety and guaranteeing that non-employees will not be able to access the tower site, that is even more cause for concern.

Moreover, the broadcasters are seeking federal preemption

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<sup>9</sup> See Va. Code 15.1-427, *supra*.

<sup>10</sup> *Ours Properties v. Ley*, 198 Va. 848, 851, 96 S.E.2d 754, 756 (1951).

<sup>11</sup> Va. Code. Section 8.01-644 et seq. (Michie 1992).

<sup>12</sup> NPRM at Par. 7.

from local regulation, not just for towers, but for all transmission-related facilities -- which could conceivably include production studios and even management offices. As little justification as there is for exempting radio towers from zoning and building codes, there is even less reason to permit studios and offices to use the excuse of digital television to receive a blanket exemption from all local regulations.

C. THE COMMISSION DOES NOT HAVE THE AUTHORITY TO PREEMPT STATE AND LOCAL LAND USE AND ZONING POLICY

The Commission, in seeking to create a federal policy for digital television, asks whether its involvement in local planning and zoning disputes is appropriate. The County's answer is absolutely not. The Commission states that generally it has tended to stay out of disputes between localities and telecommunications services providers unless there is a clear demonstration that Congress intended state and local law to be superseded.<sup>13</sup>

Historically, the Commission's involvement in Mass Media policy has been primarily in two areas. First, the Commission has been charged since 1934 with the duty to ensure the orderly allocation of channels.<sup>14</sup> Secondly, it has been charged by Congress to make sure that the public interest is served by television programming that reflects a broad range of interests

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<sup>13</sup> NPRM at Par. 15.

<sup>14</sup> Telecommunications Act of 1934, 47 U.S.C. Sec. 303

and serves public needs.<sup>15</sup> Even given the plenary nature of the power of the Commission,<sup>16</sup> its statutory authority over the mass media is not unlimited,<sup>17</sup> particularly where a proposed rule would create an unnecessary statutory conflict.<sup>18</sup> County land use regulations are not facially or otherwise in conflict with the issuance of DTV licenses, nor with the Commission's recommended rollout schedule. The Commission should neither presume nor create a conflict where there is none.

Additionally, there is no indication within the legislative history of the 1996 Telecommunications Act ("1996 Act") that Congress intended a rollout of digital television so rapid that it would necessarily need preemption of all state and local land use law. It is important to note that Congress did not even require the Commission to implement advanced television in the 1996 Act.<sup>19</sup> Clearly, if Congress had meant this federal law to attempt to preempt state and local zoning and land use law to implement DTV, it could have done so expressly, as it did elsewhere in the 1996 Act.<sup>20</sup> But Congress did not make the

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<sup>15</sup> 47 U.S.C. Section 151 (1934).

<sup>16</sup> Id. (Purpose of 1934 Act is to make available "a rapid, efficient, Nation-wide and world-wide radio communication service with adequate facilities").

<sup>17</sup> See Louisiana Public Service Commission v. F.C.C., 476 U.S. 355, 368, 90 L.Ed.2d 369, 381-82 (1986) (critical question is whether Congress intended that federal regulation supersede state law).

<sup>18</sup> Id., 476 U.S. at 370, 90 L.Ed. 2d at 383 (construction of statutes should not be read so as to create a conflict).

<sup>19</sup> See Telecommunications Act of 1996, P.L. 104-104 (Feb. 8, 1996), Section 201(codified at 47 U.S.C. 336(a) ("...If the Commission determines to issue licenses for advanced television services ...") (emphasis added).

<sup>20</sup> See, e.g., 1996 Act, Section 704 (codified at 47 U.S.C. 332(c)(7) (regulation of personal wireless service facilities by

issuance of DTV licenses mandatory, and the Commission cannot, and should not, assume an overriding congressional intent where none exists.

Finally, as the Commission itself notes, it has generally not felt it necessary to become involved in local zoning issues.<sup>21</sup> The Commission is only permitted to issue regulations that are "reasonably ancillary to the effective performance of [its] various responsibilities for the regulation of television broadcasting."<sup>22</sup> The Commission has not previously considered land use regulation "reasonably ancillary"; there has been no indication in the 1996 Act that Congress desired new involvement in land use where generally there has heretofore been none. Without some clear expression of congressional intent, the Commission may not preempt valid state law, if then.<sup>23</sup> The regulation proposed by the broadcasting industry is not within the ambit of the Commission's statutory authorization, much less its expertise on the unknown consequences of such drastic action.

The County believes that it is clearly inappropriate for the Commission to surpass its authority by adjudicating disputes between local government entities and broadcasters. The Commission should therefore recognize that any disputes that arise with regard to DTV implementation should be adjudicated in a court of competent jurisdiction. These courts, not the

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state and local governments limited by federal requirements)).

<sup>21</sup> NPRM at Par. 15.

<sup>22</sup> F.C.C. v. Midwest Video Corp., 440 U.S. 689, 708, 59 L.Ed.2d 692, 707 (1979) (citing United States v. Southwestern Cable, 392 U.S. 157, 178, 20 L.Ed.2d 1001 (1972)).

<sup>23</sup> City of New York v. F.C.C., 486 U.S. 57, 64 (1988); See also United States v. Commonwealth of Virginia, Civ. No. 97-39-A, 1997

Commission, have the experience and are the proper places to resolve issues of statutory interpretation. In such disputes, the burden of proof should be placed on the broadcaster to demonstrate why compliance with state and local law is illegal.

D. ACROSS-THE-BOARD PREEMPTION FOR ALL BROADCAST SERVICES HAS NO RATIONAL BASIS

Even assuming arguendo that preemption of the local land use review process for DTV broadcasters is found by the Commission to be necessary and within its power, no similar balance can be struck for all broadcast entities, analog or digital, radio or television. In the case of non-collocated FM radio stations, LPTV stations, AM stations and public/educational television stations, there simply is not the putative time concern as expressed for DTV. As noted above, educational and public television stations have at least until 2003 to convert to digital, and the Commission has already stated in its Fifth Report and Order that it intends to be lenient on stations that miss the deadline.<sup>24</sup>

As for radio stations, particularly those that do not have to relocate due to DTV implementation, there is no clear rationale for exempting them from local land use regulations with which every other occupant of local land must comply. There is no public interest to be served by exempting these entities from laws of general applicability. The County recommends that the

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U.S. Dist. Lexis 10774 (July 22, 1997), Slip. Op. At 10-12.

Commission not extend this preemption to any entity -- and certainly not to entities that are under no compelling time constraint.

### III. CONCLUSION

The County has a right under the United States Constitution and Virginia law to protect its citizens by promulgating and enforcing public safety regulations. These rights have traditionally been held by the states and delegated to localities.

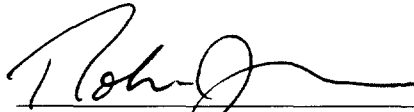
By the same token, the Commission does not have any explicit statutory authority to preempt the police powers of the states merely by virtue of the fact that it regulates an industry that does business in those states. While Congress may have attempted to grant preemptive authority to the Commission with respect to satellite dishes, Congress did not attempt to give the Commission the same kind of explicit authority to expedite the rollout of DTV. In the absence of a record demonstrating substantial and

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<sup>24</sup> Fifth Report and Order at Par. 104.

significant interference with federal telecommunications policy,  
the Commission cannot use its limited powers to invalidate state  
and local laws of general applicability.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Rob-J", with a long horizontal flourish extending to the right.

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Robert J. O'Neill Jr.  
County Executive  
Fairfax County, Virginia